Supreme Court, U.S.
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No. 09-1212

In the
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BILLY GROVES, INDIVIDUALLY, D.B.A. SAVANNAH RE-LOAD, SAVANNAH RE-LOAD, AND BRAMPTON ENTERPRISES, LLC, D.B.A. SAVANNAH RE-LOAD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This is a contracts case, albeit one that arose from the world of transportation. Norfolk Southern Railway Company (hereinafter "Norfolk Southern") seeks to recover demurrage—a fee which is akin to a rental charge for the use of Norfolk Southern's rail cars—from Brampton Enterprises LLC d/b/a Savannah Re-Load (hereinafter "Savannah Re-Load"). Because demurrage is based on contract principles, Norfolk Southern can recover it from anyone who is a party to the transportation contract. A consignee is not a party to the transportation contract between the shipper and the carrier; however, a consignee joins the transportation contract when it accepts freight consigned to it and therefore becomes liable for demurrage.

Savannah Re-Load is a warehouseman and is not the consignee for any of the freight it handles. However, Norfolk Southern delivered freight to Savannah Re-Load's facility where the bills of lading allegedly misidentified Savannah Re-Load as the consignee. Savannah Re-Load was unaware of this designation.

Given Norfolk Southern's efforts to collect demurrage from Savannah Re-Load on the ground that Savannah Re-Load adopted the transportation contract by accepting freight without knowledge it had been named the consignee, the following questions arise:

1. Does a bill of lading, which is a contract between the carrier and the shipper, bind a third party without that third party's consent or knowledge?

2. Can Savannah Re-Load be made a party to the transportation contract between the shipper and carrier, and therefore liable for demurrage, against its will and without its knowledge?

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The caption of this brief contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

The caption incorrectly identifies "Billy Groves, individually, d/b/a Savannah Re-Load, Savannah Re-Load" as Respondents. The district court dropped William Groves and Savannah Re-Load as Party Defendants on December 14, 2007. (R-19).

Respondent Brampton Enterprises, LLC is a non-governmental limited liability company having no parent or publicly held company owning 10% or more of the its stock.

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STATEMENT OF THE CASE

Norfolk Southern filed this action in the district court and seeks to recover $70,680 from a family-owned company with six employees. Norfolk Southern alleges Savannah Re-Load is a consignee, and therefore liable for demurrage, in various bills of lading. The unrebutted evidence is that any bill of lading which identified Savannah Re-Load as consignee[1] did so in error, without Savannah Re-Load's consent or knowledge. (R-26, Ex. A, p. 2).

Demurrage Background

"[D]emurrage is 'a charge exacted by a carrier from a shipper or consignee on account of a failure to load or unload cars within the specified time prescribed by the applicable tariffs. . . .'" *Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558, 559 (3rd Cir. 1997)(citing *Black's Law Dictionary* 432 (6th ed. 1990)). Liability for demurrage may be imposed against a consignor, consignee, or owner of the property, or on others by

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[1] Norfolk Southern states in its petition that the "various bills of lading for the freight contained within the rail cars all named [Savannah Re-Load] as the sole consignee." (Pet., p. 18). However, this is not correct. Many of the documents identify an "ultimate consignee" and reveal that the freight will be exported via container ship following its delivery to Savannah Re-Load. (R-46, Ex. A, NS 1237-1255, 1260-1262, 1265-1270, 1314-1316, 1322-1330, 1336-1359, 1377-1379, 1385-1422). Other documents do not contain the word "consignee." (R-46, Ex. A, NS 1442-1495); *see also Norfolk Southern Ry. Co. v. Groves*, 586 F.3d 1273, 1276 (11th Cir. 2009) (finding that "many of these bills of lading also named an ultimate consignee and printed copies of the electronic bill of lading data submitted by Norfolk did not actually contain the word 'consignee'").

statute, contract, or prevailing custom. *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 254 (3rd Cir. 2007)(hereinafter "*Novolog*"). Demurrage liability in this case is a matter of contract. *Norfolk Southern Ry. Co. v. Groves*, 586 F.3d 1273, 1278-79 (11th Cir. 2009)(hereinafter "*Groves*"). The bill of lading is "the basic transportation contract between the shipper-consignor and the carrier." *Southern Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342 (1982). The consignee becomes liable for demurrage under quasi-contract notions by accepting delivery of the goods consigned to it, thereby becoming a party to the transportation contract. *Groves*, 586 F.3d at 1278-79; *Novolog*, 502 F.3d at 254.

Conversely, non-parties to the transportation contract are not liable for demurrage,[2] a point on which the Eleventh, Seventh and Third Circuits agree. *See Groves*, 586 F.3d at 1278-79; *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813, 820 (7th Cir. 2003); *Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d at 563. Indeed, the ICC[3] also has a "longstanding policy not to extend demurrage tariffs to persons who are not parties to the transportation contract." *Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d at 563 (quoting a memorandum the ICC filed in the case).

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[2] "Norfolk has not offered any evidence of prevailing industry custom or applicable statute that would hold non-parties to a shipping contract liable for demurrage." *Groves*, 586 F.3d at 1278.

[3] As Norfolk Southern notes in its petition, the Interstate Commerce Commission Termination Act eliminated the Interstate Commerce Commission ("ICC") and replaced it with the Surface Transportation Board ("STB"). (Pet., p. 10 n.5).

Given this contractual background, it is not surprising that few decisions have addressed whether a non consignee joins the transportation contract against its will by receiving freight where it has been unilaterally identified as a consignee. Until 2007, the courts which addressed this question uniformly refused to hold that the unilateral action of a third party could render a non-consignee liable for demurrage. *See Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc*, 337 F.3d 813, 821 (7th Cir. 2003); *Union Pac. R.R. Co. v. Carry Transit, Inc.*, No. 3:04-CV-1095, 2005 U.S. Dist. LEXIS 45568, at *14 (N.D. Tex. Oct. 27, 2005)("The Court declines to untether the law of demurrage from its contractual moorings . . . . [The] unilateral decision to name a non-party to the transportation contract . . . as a consignee without its consent does not render the non-party liable for demurrage charges.")(hereinafter *"Carry Transit"*); *CSX Transp., Inc. v. City of Pensacola*, 936 F. Supp. 880, 884 (N.D. Fla. 1995) ("The unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage."); *Western Maryland Ry. Co. v. South African Marine Corp.*, No. 86 CIV 2059, 1987 WL 16153, at *4 (S.D.N.Y. Aug. 13, 1987)("[W]e decline to hold, as plaintiff urges, that a connecting ocean carrier is liable for rail demurrage charges as a matter of law merely by virtue of being named by the shipper as the consignee in the rail bills of lading."); *Southern Pac. Transp. Co. v. Matson Navigation Co.*, 383 F. Supp. 154, 157 (N.D. Cal. 1974)("[W]here, as here, a connecting carrier-consignee is merely named in the railroad bill of lading without either more involvement on its part, or some culpability for the delay, it cannot be held liable to the railroad for demurrage. (citation omitted) To hold otherwise on these facts would be to

place a connecting carrier's liability totally within the shipper's control, a result the Court cannot sanction."); *Missouri, K. & T. Ry. Co. v. Capital Compress Co.*, 50 Tex. Civ. App. 572, 110 S.W. 1014 (Tex. Civ. App. 1908)(holding that company had no contractual relationship with railroad and therefore was not liable for demurrage despite a bill of lading mistakenly naming company as consignee).

This 99-year-old line of reasoning[4] lasted until the Third Circuit decided *Novolog* in 2007. In *Novolog*, the Third Circuit held for the first time that an entity designated as the consignee in a bill of lading through the unilateral action of a third party could not avoid demurrage charges by showing its lack of consent to being so designated. *Novolog*, 502 F.3d at 258. The Third Circuit did not discuss the contractual nature of a bill of lading or demurrage, other than to observe summarily that the consignee becomes a party to the transportation contract upon accepting the freight. *Id.* at 254. More importantly for purposes of this petition, *Novolog* did not address whether an entity named as consignee without its knowledge becomes a party to

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[4] In its Amicus Brief, the American Association of Railroads misstates this legal backdrop by claiming that "[u]ntil the Eleventh Circuit's decision below, the law was clear that a consignee named in the bill of lading becomes a party to the transportation contract, and is bound by it, when it accepts the freight." (Brief, p. 9)(emphasis added). Being named in the bill of lading has never been the determinative fact. With the exception of *Novolog*, every court which has considered the issue has concluded that being "named in the bill of lading" alone does not determine consignee status. The absence of cases to the contrary no doubt led the Eleventh Circuit to observe that "Norfolk Southern relies almost exclusively on the Third Circuit's decision in *Novolog*. . . ." *Groves*, *supra*, at 1280.

the transportation contract where it was never notified, until after the delivery of the freight, that it had even been identified as consignee. The Eleventh Circuit found this lack of notice dispositive. *Groves*, 586 F.3d at 1282. Given *Novolog's* silence on the issue of notice, there is no way to know how the Third Circuit would decide the instant case.

Facts Of This Case

There is no dispute that Savannah Re-Load was not the freight's ultimate consignee. (R-26, Ex. A, pp. 1-2; *See Groves*, 586 F.3d at 1278 (recognizing Savannah Re-Load to be "neither consignor nor owner of the freight" but rather a "freight handler"). Savannah Re-Load does not purchase the freight delivered to its facility, has no ownership interest in it, and has none of the rights or obligations of a consignee. (R 26, Ex. A, p. 1).[5] Instead, Savannah Re-Load is a warehouseman, receiving freight, storing it and reloading it into an appropriate container for export through the Georgia Ports Authority. (R-26, Ex. A, p. 2). Savannah Re-Load had no contractual relationship with the actual consignee and did not know its identity or the freight's ultimate destination (R-60, Ex. A, p. 2). It did not receive bills of lading from Norfolk

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[5] A consignee is generally vested with ownership of the freight consigned to it. *Grove v. Brien*, 49 U.S. 429, 439 (1850). As a result, the consignee is expected to examine the shipment's contents to determine whether they "answer the description ordered by him." *Reed Oil Co. v. Smith*, 154 Ga. 183, 186-87, 114 S.E. 56, 58 (1922). "[A] consignee may [therefore] direct the manner of the transportation of a shipment addressed to him." *Saunders Bros. v. Payne*, 29 Ga. App. 615, 615 16, 116 S.E. 349, 350 (1923)(internal citations omitted).

Southern or anyone else and never agreed to be named consignee. (R-26, Ex. A, pp. 1-2). Importantly, Savannah Re-Load did not know it had been named consignee on the freight delivered to its facility—a fact which distinguishes this case from *Novolog*.[6] Simply put, Savannah Re-Load was not the consignee.[7]

Norfolk Southern alleged in an amended complaint that Savannah Re-Load was identified as consignee on rail car shipments which Norfolk Southern delivered to Savannah Re-Load's facility. (R-67, Ex. A, p. 75). In its original complaint, however, Norfolk Southern sued Savannah Re-Load for demurrage which allegedly[8] accrued on every shipment, irrespective of whether

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[6] *Novolog* does not address the issue of notice.

[7] *Carry Transit*, *supra*, at *17 ("Although Carry Transit's Arlington facility may be the final stop on the Union Pacific rail line, Carry Transit is merely a transloader that unloads products from the rail cars and then delivers them to locations designated by their customers. (internal citations omitted). Carry Transit cannot thus be said to have any beneficial interest in its customers' products that are transported by [the plaintiff carrier].").

[8] Norfolk Southern claims that Savannah Re-Load's "sole defense to the claim was that it never agreed with any shipper to be named as the consignee on the bills of lading, and never received notice prior to delivery that it was named as consignee on the bills of lading." (Pet., p. 19). It is true that the district court granted summary judgment to Savannah Re-Load on the issue of its adoption of the transportation contract, that the Eleventh Circuit affirmed the district court's order and that Savannah Re-Load's alleged adoption of the transportation contract is the only issue on appeal. However, this point was not Savannah Re-Load's sole defense to Norfolk Southern's demurrage claim in the district court.

Savannah Re-Load was identified as consignee on the bill of lading. (R-1; R-67, Ex. A, p. 75). After Savannah Re-Load moved for summary judgment, Norfolk Southern amended its complaint to exclude shipments where Savannah Re-Load was not identified as consignee. (R-41; R-67, Ex. A, p. 75). For the remaining shipments, Norfolk Southern based liability on the ground that Savannah Re-Load was named as consignee in the associated bill of lading and became liable for any demurrage which accrued when it accepted the freight.

The district court granted Savannah Re-Load's motion for summary judgment on this question and the Eleventh Circuit affirmed. Norfolk Southern now petitions this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

Norfolk Southern asks this Court to consider an issue which rarely arises and which has a modest impact upon rail carrier operations. Norfolk Southern (1) contends there is a split between the Eleventh and Third Circuits, (2) warns against far-reaching implications for the nation's rail transportation network, and (3) claims the Eleventh Circuit's opinion was so flawed as to constitute a departure from the accepted and usual course of judicial proceedings. Each argument is flawed and fails to justify a grant of the petition. The petition should therefore be denied.

A close examination of the Eleventh Circuit's *Groves* decision and the Third Circuit's *Novolog* decision reveals there is no split between those circuits. The Eleventh Circuit's decision is premised upon Savannah Re-Load's lack of knowledge that it

had even been identified as consignee. There is no discussion or suggestion in *Novolog* that the alleged consignee there had such lack of knowledge, and it is not clear how the Third Circuit would decide this case.

Moreover, Norfolk Southern's warnings that the Eleventh Circuit's opinion will harm the nation's rail transportation network are unfounded. Like any other litigant, rail carriers can use discovery to identify, and build a demurrage case against, the consignee in those rare instances where there is a dispute over the listed consignee's knowledge. If the carrier prefers to avoid the question altogether, it can always sue the shipper or any other party to the transportation contract for the demurrage. Whichever method Norfolk Southern chooses, there will be no impact upon freight delivery given that Norfolk Southern calculates demurrage and identifies the responsible entity after the fact. Additionally, since warehousemen such as Savannah Re-Load are incentivized to return empty rail cars in order to receive a fresh batch for unloading, Norfolk Southern's concerns about delayed returns are unfounded.

Regretting its decision to file this case in federal court, Norfolk Southern now seeks to undo years of litigation it initiated and have this matter transferred to the Surface Transportation Board. However, Norfolk Southern cannot raise this issue now for the first time before this Court. Moreover, its alleged basis for its jurisdictional claim—that the Eleventh Circuit redefined Norfolk Southern's tariff—is not supported by the action taken in the courts below. On its face, the Eleventh Circuit's decision did not purport to redefine or make any changes whatsoever to Norfolk Southern's tariff. It merely prevents Norfolk Southern

from going beyond established legal boundaries in collecting a debt.

Recognizing and enforcing these legal boundaries is far from a departure from the accepted and usual course of judicial proceedings which requires this Court's review. The Eleventh Circuit sided with 99 years of legal precedent in concluding that, because demurrage is based on contract concepts, one cannot be deemed to have unwillingly or unknowingly joining that contract.

A. No Circuit Split Exists On Whether A Consignee Can Be Liable Where It Does Not Know It Has Been Identified As Consignee.

This matter is not worthy of review by this Court because there is no split of authority between the Eleventh Circuit and the Third Circuit. *Groves* hinged on Savannah Re-Load's lack of notice that it had been identified as consignee on some of Norfolk Southern's bills of lading. *Groves*, 586 F.3d at 1282. The Eleventh Circuit recognized that Savannah Re-Load needs such notice "in order that it might object or act accordingly." *Id.* A meeting of the minds, necessary to join the transportation contract, could not occur without this notice. *Id.* at 1281.

In contrast to *Groves*, the *Novolog* court gave no treatment whatsoever to what impact a lack of notice might have on consignee liability.[9] Instead, the Third

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[9] Norfolk Southern calls *Novolog* and *Groves* "nearly identical" factually and argues the defendant in *Novolog* may have lacked notice because it (1) did not assent to being named consignee in

Circuit addressed only whether the bill of lading could establish the identity of the consignee. *Novolog*, 502 F.3d at 257 ("Having determined that [the Interstate Commerce Commission Termination Act's] consignee-agent notification provision applies to the assessment of demurrage charges, we must decide whether it automatically applies to entities that are named as consignees on the bills of lading or whether more is required to turn such entities into 'legal consignees' subject to it.").

The Third Circuit's reasoning does not cover the "lack of knowledge" situation present here. Citing 49 U.S.C. § 10743(a)(1), the Third Circuit held that a transloader named on the bill of lading as sole consignee is presumptively liable for demurrage unless it accepts the freight as the agent of another "**and notifies the carrier in writing prior to delivery**." *Novolog*, 502 F.3d at 250 (emphasis added). If the transloader does not know it has been named on the bill of lading until after the freight has been delivered, it cannot give timely notice to the carrier and will thus be conclusively liable. When, as here, the carrier routinely also makes deliveries to the transloader under bills of lading that do not identify the transloader as consignee, the transloader is placed in an untenable position when the freight shows up at

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the bills of lading and (2) did not prepare any of the bills. (Pet., p.23). However, the simple fact is that *Novolog* makes no mention of whether the alleged consignee received notice and does not address whether a misidentified consignee joins the transportation contract where it does not know it has been misidentified.

the tranloader's warehouse.[10] There is no reason to believe the Third Circuit would place transloaders in such a position.

Norfolk Southern's claim that the Eleventh Circuit's ruling "has left the nation's interline railroads with different rules and liabilities" (Pet., p. 11) is thus premature. The Third Circuit has not determined what impact a lack of notice has on a misidentified consignee's demurrage liability.[11] It is entirely possible the Third Circuit would reach the same conclusion reached by the Eleventh Circuit in *Groves*, or it may decide the issue in a way unforeseen by either party. Given the lack of conflicting opinions on this issue, this Court need not "resolve" a conflict where it is not clear any conflict exists. Allowing other courts, including the Third Circuit, to consider the issue might reveal there is no circuit split. If not, the additional attention these courts give to the question would assist this Court were it eventually to consider the issue.

This Court can give the circuit courts time to resolve this issue because there is no immediate impact on the nation's rail freight network. Norfolk Southern's sweeping claims to the contrary are

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[10] The Eleventh Circuit observed that "Norfolk routinely delivered freight to Savannah [Reload's] facility pursuant to bills of lading where Savannah [Re-Load] was not the named consignee." *Groves*, 586 F.3d at 1276-77.

[11] Norfolk Southern incorrectly claims Savannah Re-Load would be liable if it were physically located in the Third Circuit. (Pet., p. 22). There is no way to know how the Third Circuit would decide the instant case.

unfounded and contrary to the record. Putting aside the sub-issue of notice, the question of whether a party misidentified as consignee on a bill of lading can be held liable for demurrage appears to have been decided a total of eight times in the past ninety-nine years. The paucity of controversy prompted the Eleventh Circuit to observe that "research has disclosed very few opinions by federal circuit courts dealing with the narrow issue presented in this case." *Groves*, 586 F.3d at 1278 n.4. The issue of a consignee's knowledge is especially unlikely to cause problems going forward. The American Association of Railroads ("AAR") observed in its *amicus* brief that rail carriers already give "specific advance notice" of various kinds of information to freight recipients, so advising the recipients of their designation as consignee should add little burden. (Amicus Brief, p. 14).[12] If the AAR is correct, Norfolk Southern need not fear that the lack of notice on which the Eleventh Circuit based *Groves* will be replicated nationwide.

Finally, even if a conflict does exist, this narrow issue is best left to percolate further. This Court declined to issue a writ of certiorari following the

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[12] The American Association of Railroads, disregarding the record in this case, makes the bald claim that "[o]nly the alleged agent-consignee named as consignee in a bill of lading is aware of its putative agent-consignee status prior to its acceptance of the goods delivered by the carrier," (Amicus Brief, p. 14), and that Savannah Re-Load "simply declined," (Amicus Brief, p. 15), to notify Norfolk Southern that Savannah Re-Load was not the freight consignee. These statements overlook the undisputed, critical fact in the record on appeal that Savannah Re-Load was not aware of its consignee designation, a central part of the Eleventh Circuit's holding.

Novolog decision only two years ago. *Novolog Bucks County v. CSX Transp. Co.*, 552 U.S. 1183 (2008). The same considerations which dictated that denial should govern here.

B. Norfolk Southern Vastly Overstates The Impact Of The Eleventh Circuit's Opinion To The National Rail System Where Norfolk Southern Can Sue The Other Parties To The Transportation Contract, Does Not Determine Demurrage Liability Before Delivering Freight And Does Not Bill For Demurrage Based Upon Consignee Status.

Norfolk Southern greatly overstates the ramifications of the Eleventh Circuit's opinion. There is no adverse impact upon the nation's rail freight system if for no other reason than the carrier can always collect demurrage from someone other than the consignee. "[A]s an original party to the shipping contract, a consignor is clearly liable for demurrage." *Groves*, 586 F.3d at 1278. In those rare instances where the carrier experiences difficulty recovering from the consignee, the carrier thus can collect demurrage from other parties to the transportation contract, including the consignor.[13] "The most likely candidates would be the shippers themselves, with

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[13] Savannah Re-Load anticipates that Norfolk Southern will reply that its tariff does not permit it to collect from the consignor unless demurrage accrues at the origin. However, Norfolk Southern drafted the tariff and Savannah Re-Load should not be held responsible if Norfolk Southern did so in a self-limiting way. Norfolk Southern's decision to draft its tariff in this manner undermines its claim that its ability to collect demurrage cannot be compromised in any way.

whom [Norfolk Southern] had contracts and who were responsible for naming [Savannah Re-Load] as the consignee in the relevant bills of lading." *Carry Transit*, *supra*, at *14. Norfolk Southern's dire warnings of unworkable demurrage rules where it cannot ascertain the identity of the consignee from the bill of lading, (Pet., pp. 30-31), are unfounded.

Also unfounded are Norfolk Southern's claims that rail service will be disrupted because it is now forced to investigate and confirm the identity of the "true and consenting consignee before delivering loaded rail cars. . . ." (Pet., p. 21)(emphasis added). Norfolk Southern does not bill the consignee for demurrage; it bills whomever unloaded the rail car. (R-67, Ex. A, p. 76). In fact, Norfolk Southern does not even *look* at the bill of lading when collecting demurrage. *Id.* In effect, Norfolk Southern argues it is critically important that it be able to rely upon a document it does not use.[14]

Norfolk Southern similarly claims nationwide demurrage recovery efforts will be hindered if the consignee can simply deny having consented to that designation. (Pet., p. 25). Norfolk Southern's alleged

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[14] The record on appeal illustrates this point. Norfolk Southern routinely delivered freight to Savannah Re-Load where Savannah Re-Load was not named as consignee on the bills of lading. (R-67, Ex. A, p. 76). Yet it sued Savannah Re-Load for demurrage which allegedly accrued on those shipments. (R-1; R-67, Ex. A, p. 76). After Norfolk Southern filed suit, it realized Savannah Re-Load was not liable for demurrage on those deliveries and amended its complaint accordingly. (R-41; R-67, Ex. A, p. 76). Since Norfolk Southern must collect demurrage by law, (Pet., pp. 20-21), it presumably began collection efforts against the actual consignee, which necessarily occurred more than a year following delivery. The delivery itself was not affected.

handicap is illusory. As discussed above, Norfolk Southern is not limited to recovering demurrage from the consignee. Norfolk Southern, or any carrier, is free to collect demurrage from the other parties to the transportation contract. Additionally, the carrier is always capable of seeking discovery of information to disprove the freight recipient's statement that it had no knowledge it had been listed as consignee. The carrier might, through discovery, obtain emails, documents or statements from witnesses which demonstrate the defendant had pre-delivery knowledge it had been designated as consignee. Moreover, a consignee is much more than someone who simply consents to being listed on the bill of lading.[15] While that might be one way to establish liability for demurrage, a consignee is also vested with rights and obligations[16] which can be investigated through the use of discovery. Norfolk Southern seems to suggest that a consignee will have possession of the bill of lading.[17] (Pet., pp. 31-32).[18] If that be true,

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[15] "[C]onsignee status is more than a mere designation." *Groves*, *supra*, at 1281. "Consignment" means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale. . . ." U.C.C. § 9-102(a)(20). The Uniform Commercial Code refers to a bill of lading as a "document of title." U.C.C. § 7-104 (2005). The Uniform Commercial Code recognizes that a warehouseman is a distinct entity. U.C.C. §7-102(a)(13) (2005).

[16] See footnote 5, *supra*.

[17] There is no dispute Savannah Re-Load did not receive the bill of lading, further proof it is not the consignee.

[18] Norfolk Southern makes the statement that "the law presupposes that the consignee 'has possession of the

proving the identity of the consignee may be as simple as determining to whom the consignor delivered the bill of lading.[19]

Norfolk Southern also argues that misidentified consignees will have no incentive to return rail cars promptly, defeating the purpose of demurrage. (Pet., p. 25). However, warehousemen such as Savannah Re-Load are paid to unload rail freight, (R-26, Ex. A, p. 1), and are therefore already incentivized to return empty rail cars as quickly as possible to get new cars for unloading. Moreover, it is not in the warehouseman's interest to permit demurrage to accrue. A warehouseman's client, whether a shipper, consignee, freight forwarding company or otherwise, is more likely to switch to a competitor if the warehouseman "misuse[s the rail cars] as free storage facilities," (Pet., p. 25), so as to permit demurrage to accrue.

[nonnegotiable] bill [of lading]' before delivery is made." (Pet., p. 32). However, Norfolk Southern cites no authority for this presupposition.

[19] Norfolk Southern claims the Eleventh Circuit opinion requires the carrier to provide the consignee with a copy of the bill of lading and that, in reality, the reverse should occur. (Pet., p. 32). However, the Eleventh Circuit did not reach this conclusion and made no such holding. To the extent notice is dispositive, Norfolk Southern can provide the necessary information to the warehouseman via facsimile, email, or any number of methods. The AAR admits that rail carriers already give "specific advance notice" of various types of information to freight recipients, so advising the recipients of their designation as consignee should add little burden. *See* Amicus Brief, p. 14.

C. The Eleventh Circuit Had Concurrent Jurisdiction To Rule On The Issue Norfolk Southern Brought Before It And Did Not Infringe On The STB's Jurisdiction By Deciding A Straightforward Matter Of Federal Law.

Norfolk Southern filed this lawsuit in the United States District Court for the Southern District of Georgia, asking the district court to enter judgment that Savannah Re-Load was liable for demurrage. When the district court ruled against it, Norfolk Southern appealed to the Eleventh Circuit. Now that the Eleventh Circuit has also ruled against it, Norfolk Southern takes the position for the first time that neither lower court had jurisdiction to decide the very issue Norfolk Southern put before it. It asks this Court to undo eighteen months of litigation and the work of two federal courts over a $70,000 claim, and to refer the case to the STB. Pet., pp. 26-30. At no time, either in filing the complaint (R-1), amending it (R-41), moving for partial summary judgment on Savannah Re-Load's consignee status (R-29; R-30), opposing Savannah Re-Load's motion for summary judgment on its consignee status (R-30), filing its appellate briefs or petitioning the Eleventh Circuit for a rehearing en banc, did Norfolk Southern ever advise either the district court or the circuit court that they lacked jurisdiction to determine this issue.

Norfolk Southern appears to take the position that federal courts can rule in favor of rail carriers on the issue of demurrage liability (R-29; R-30), but not against them. As Norfolk Southern's complaint made clear, however, it based jurisdiction on a federal question under 28 U.S.C. § 1331. (R-1, ¶¶ 1, 8; R-41,

¶¶ 1, 8). The district court and the Eleventh Circuit responded with an answer based upon federal law.

Norfolk Southern claims *Novolog* supports its jurisdictional argument in two ways. First, Norfolk Southern alleges *Novolog* distinguishes between primary and "exclusive" jurisdiction based upon whether the demurrage charges are assessed under an agreement—namely the transportation contract—versus a tariff. (Pet., p.29 n.25, *citing Novolog* 502 F.3d at 250, 252-53). *Novolog* makes no such distinction and the quoted material Norfolk Southern cites in footnote 25 of its petition appears in the opening paragraph of the opinion, not in the Third Circuit's treatment of jurisdiction. *See Novolog*, 502 F.3d at 250 ("The transloader objected to the assessment, arguing that it could not be subjected to charges under an agreement--***namely the transportation contract***--to which it was not a party.")(emphasis added). Second, Norfolk Southern claims Novolog provides that objections to jurisdiction based upon an argument that the STB's jurisdiction is exclusive can be raised at any point. (Pet., p. 29 n.25, *citing Novolog*, 502 F.3d at 253). Not only does Norfolk Southern misstate *Novolog*, which never mentioned the terms "exclusive jurisdiction," but the Third Circuit came to the conclusion that arguments based upon the STB's primary jurisdiction had been waived. *Novolog*, 502 F.3d at 253.

The jurisdictional issue Norfolk Southern raises does not warrant a grant of its petition because the district court had jurisdiction to grant summary judgment in Savannah Re-Load's favor. At this late date, the policies underlying the doctrine of primary jurisdiction are not served by referring this case to the

STB. Moreover, this case does not present issues requiring the STB's unique expertise. In arguing that the district court and the circuit court lacked jurisdiction to hold Savannah Re-Load was not the consignee, (Pet., p. 30), Norfolk Southern mistakenly equates the "exclusive jurisdiction" granted the STB by 49 U.S.C. § 10501(b) to subject matter jurisdiction (Pet., p. 29 n.25). To the contrary, federal district courts and the STB have concurrent jurisdiction over ICCTA claims. *Pejebscot Indust. Park, Inc., v. Main Central R.R. Co.*, 215 F.3d 195, 200-05 (1st Cir. 2000) (holding, after exhaustively reviewing the legislative history of 49 U.S.C. § 10501(b) and related statutes, that concurrent jurisdiction exists despite language in 49 U.S.C. § 10501(b) that gives the STB "exclusive" jurisdiction over any claim involving "transportation by rail carriers").

Primary jurisdiction, which was the doctrine discussed in *Novolog*, does not strictly limit the power of the courts but rather is intended to "serve as a means of coordinating administrative and judicial machinery and to promote uniformity and take advantage of the agencies' special expertise." *Pejebscot Indust. Park, Inc.*, 215 F.3d at 205 (internal quotation marks and citation omitted).

> The doctrine of primary jurisdiction determines whether the federal court will refrain from exercising its unquestioned jurisdiction over a dispute until after an administrative agency has resolved some question arising in the proceeding before the court. It represents a recognition of the need for an orderly coordination between the functions of

> court and agency in securing the objectives of their often overlapping competency.

Interstate Commerce Comm'n v. All-American, Inc., 505 F.2d 1360, 1362 (7th Cir. 1974).

When a claim is cognizable in both federal court and an administrative agency, the district court "may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). This determination should occur when the issue "involves the special expertise of the agency and would impact the uniformity of the regulated field." *DeBruce Grain, Inc. v. Union Pac. R.R. Co.*, 149 F.3d 787, 789 (8th Cir. 1998). In contrast, "[a]pplication of the doctrine has been refused when the issue at stake is legal in nature and lies within the traditional realm of judicial competence." *Goya Foods, Inc. v. Tropicana Prod., Inc.*, 846 F.2d 848, 851-52 (2nd Cir. 1988)(citing *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976)). The doctrine does not

> require[] that all claims within an agency's purview . . . be decided by the agency." (internal citation and quotation marks omitted) Nor is it intended to 'secure expert advice' for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit. (internal citation and quotation marks omitted) Rather, it is a "doctrine used by the courts to allocate initial decision making responsibility between agencies and courts where such [jurisdictional] overlaps and

> potential for conflicts exist." Richard J. Pierce, Jr., *Administrative Law Treatise* § 14.1, p. 917 (4th ed. 2002).

Syntek Semiconductor Co., Ltd., 307 F.3d at 780 (9th Cir. 2002)(emphasis added).

Unlike subject matter jurisdiction, primary jurisdiction is discretionary. "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). Because the courts have discretion to refrain from invoking primary jurisdiction, its specter does not automatically oust the courts of jurisdiction as a lack of subject matter jurisdiction would do. *Compare Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366 n.10 (1994)(declining to invoke the doctrine of primary jurisdiction), *with Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945 (2009)("We are not free to pretermit the question. Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt."); *see also United States v. Bessemer & Lake Erie R.R. Co.*, 717 F.2d 593, 599 (D.C. Cir. 1983)("The doctrine of primary jurisdiction, despite what the term may imply, does not speak to the jurisdictional power of the federal courts."). Thus, contrary to Norfolk Southern's argument, the Eleventh Circuit did not "render[] a judgment beyond its power." (Pet., p. 30).

At this point, after obtaining final rulings from the district court and the circuit court, any question of whether this case should be referred to the STB is

moot. "No coordination would be achieved by requiring a District Court, *after* it has rendered a judgment, to vacate that judgment upon motion and refer a question it has already decided to an agency." *Novolog*, 502 F.3d at 253 (emphasis by the court). Any special expertise of the STB is of limited value where, as here, a federal court's opinion "involve[d] the analysis of precedent and statutory interpretation." *See Novolog*, 502 F.3d at 253. Thus, the doctrine of primary jurisdiction does not condone, let alone mandate, giving Norfolk Southern a third bite at the apple.

Putting aside the limited utility of a referral to the STB, primary jurisdiction does not present grounds for a writ of certiorari because the Eleventh Circuit's decision does not interpret or expand the terms of Norfolk Southern's tariff (Pet., p. 22). The Eleventh Circuit's ruling does not purport to redefine, interpret, or alter Norfolk Southern's tariff. It simply holds that, without notice, Savannah Re-Load cannot be deemed to have joined the transportation contract, a holding which requires no reference to the tariff.

The Eleventh Circuit's holding that Savannah Re-Load is not liable for demurrage does not "implicitly" interpret Norfolk Southern's tariff any more than a ruling in Norfolk Southern's favor would have "implicitly" interpreted the tariff differently. Norfolk Southern claims this case is "nearly identical" to *Novolog* (Pet., p. 23), yet there the district court had held "that its decision did not amount to a finding that CSX's rates were unreasonable." *Novolog*, 502 F.3d at 253. The Third Circuit agreed, holding that "the STB's expertise, while helpful, would not have been crucial to the determination of the issues here, which involve the

analysis of precedent and statutory interpretation." *Id.*

Norfolk Southern chose to have the federal courts decide this case, and the courts below have devoted substantial time and energy to deciding it. Norfolk Southern should not now be permitted to avoid the result it dislikes by urging it should have been before the STB.

D. The Eleventh Circuit Did Not Depart From The Accepted And Usual Course Of Judicial Proceedings By Holding Savannah Re-Load Could Not Join A Contract Where It Did Not Know It Had Been Identified As Consignee On The Relevant Bills Of Lading.

Norfolk Southern claims the Eleventh Circuit's holding is "novel"[20] and results in an "unworkable" rule of demurrage, and constitutes a departure from the accepted and usual course of judicial proceedings. (Pet., p. 30). The circuit court, however, did not depart from the accepted and usual course of judicial proceedings. To the contrary, it declined to depart from the rule having the "greatest support in the case

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[20] Although Norfolk Southern criticizes the Eleventh Circuit for coming up with a "novel definition of consignee," (Pet., pp. 30, 32), it also claims the court "fails to even define who is a consignee." (Pet., p. 34). But the court was never asked to define "consignee." Instead, the limited issue which the Eleventh Circuit considered was "whether Savannah [Re-Load] was a consignee of the freight delivered by [Norfolk Southern]." *Groves*, 586 F.3d at 1279. As the court noted, there was only a "narrow issue presented in this case." *Id.* at 1278, n.4.

law."[21] *Groves*, 586 F.3d at 1282. The circuit court upheld "several fundamental principles of law that define demurrage liability." *Id.* at 1278. It reaffirmed that "demurrage is considered part of the transportation charge and under the tariff system is imposed as a matter of law." *Id.* It also upheld longstanding law that "[l]iability for freight charges may be imposed only against a consignor, consignee, or owner of the property, or others by statute, contract, or prevailing custom." *Id.* (quoting *Evans Prods. Co. v. I.C.C.*, 729 F.2d 1107, 1113 (7th Cir. 1984). It affirmed longstanding boundaries on demurrage claims, noting that "[b]efore such transportation-related assessments such as detention charges can be imposed on a party ... there must be some legal foundation for such liability outside the mere fact of handling the goods shipped." *Groves*, 586 F.3d at 1278 (quoting *Middle Atl. Conference v. United States*, 353 F. Supp. 1109, 1118 (D.D.C. 1972)(three-judge panel)).

The circuit court's opinion did not change the basic law that an "entity must be a party to the transportation contract to be liable for demurrage charges [and] that a consignee becomes a party to the transportation contract upon accepting the freight consigned to it. . . ." *Id.* at 1279. It did not change the carrier's ability to recover demurrage or its ability to collect it from the consignee. It simply declined to take the narrow view that a bill of lading, meant to reflect

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[21] As described above, courts have rejected carriers' attempts to collect demurrage from entities misidentified as consignees on the relevant bills of lading for at least ninety-nine years.

the consignee designation, should instead conclusively determine it.[22]

Given demurrage's contractual underpinnings, the circuit court observed that "it is a fundamental principle of contracts that in order for a contract to be binding and enforceable, there must be a meeting of the minds on all essential terms and obligations of the contract." *Groves*, 586 F.3d at 1281 (quoting *Browning v. Peyton*, 918 F.2d 1516, 1521 (11th Cir. 1990)). Its holding that a party who does not consent to or know of its consignee designation cannot join the transportation contract is hardly novel. It reflects the fundamental tenant of contract law that "a contract cannot bind a nonparty." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

Norfolk Southern complains because the circuit court's opinion requires it to do just what the law has historically required rail carriers to do: sue the consignee, not someone who has been incorrectly identified as such. This requirement is not "unclear" or "unworkable." Demurrage does not give rise to a strict liability claim against an entity which might be identified in a bill of lading it had no hand in creating. Demurrage is based in contract,[23] and rail carriers are no different from any other plaintiff bringing a lawsuit based in contract. Norfolk Southern must shoulder its

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[22] Norfolk Southern provides several definitions of "consignee," (Pet., p. 32-33), none of which, other than that of the *Novolog* court, were given with this issue in mind

[23] "The parties agree that an entity must be a party to the transportation contract to be liable for demurrage charges. . . ." *Groves*, *supra*, at 1279.

burden of proving the defendant was bound by the terms of the transportation contract.[24] The policies behind demurrage do not call for a departure from the accepted and usual course of requiring a litigant to sue the proper party.

CONCLUSION

This case involves a relatively unique factual situation, unlikely to occur on a repetitive, nationwide basis. Only one circuit court has addressed the precise issue raised in this petition, and this issue would benefit from additional circuit court treatment. In the meantime, the Eleventh Circuit's opinion has modest, if any, ramifications for the national rail freight network. These factors, plus the absence of any jurisdictional issues, render this case unworthy of a writ of certiorari.

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[24] Norfolk Southern defines "consignee" as "[t]he party to whom a shipment is consigned or the party entitled to receive the shipment." (Pet. pp. 32-33)(emphasis added). This definition can be read one of two ways. If "party" refers to a party to a contract, it would not apply to a misidentified consignee since that entity is not a "party" to the contract. If "party" is defined otherwise, Norfolk Southern's tariff is broader than the law allows, as "party entitled to receive the shipment" would include non-parties to the transportation contract who are entitled to receive the shipment.

Respectfully submitted.

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